THE HON MINISTER FOR HUMAN RESOURCES

v.

THONG CHIN YOONG & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NOS: W-01-195-1996 & W-02-400-1996]
7 JULY 1999

ADMINISTRATIVE LAW: *Exercise of administrative powers - Refusal of minister to refer matter to Industrial Court - Whether justifiable - Remedies - Whether trial judge erred in law in granting writs of certiorari and mandamus*

LABOUR LAW: *Industrial Court - Minister's refusal to refer - Constructive dismissal - Whether Industrial Court proper forum to adjudicate upon matter*

The respondent, Thong, worked for the company, Berjaya Industrial Bhd, as the vice president and general manager of hotel and resorts. During that time, the respondent was suspended, without any loss of emoluments, benefits and other perks. He was alleged to have committed various acts of misconduct but the company was not specific about them. The respondent's subsequent queries on the matter were met by the answer that more time was needed to further the company's investigations. The respondent later left the company, alleging that he had been constructively dismissed.

The matter later came before the minister of human resources who refused to refer the dispute to the Industrial Court, stating nothing further than that the matter was not fit and proper for reference. The respondent applied for *certiorari* and *mandamus* in the High Court to quash the decision of the minister and to compel him to refer the matter to the Industrial Court. His applications were granted.

In two separate appeals, the minister and the company appealed against the decision of the High Court, alleging that the learned judge had committed an error of law.

Held:
Per Shaik Daud Ismail JCA

[1] The learned trial judge had correctly decided that the questions arising from the dispute should have been referred to and decided in the Industrial Court.

[2] While it is true that the legislature never intended that the minister refers every representation of an employee to the Industrial Court, yet the minister has been given the discretion to decide and he ought to exercise that discretion properly.

[3] Whether or not an employee has been constructively dismissed is a question of law which is not within the province of the minister to decide. The minister is not competent to decide, and the Industrial Court is the best venue to decide this question.

[4] In the proper exercise of his discretion, the minister ought to have referred the matter to the Industrial Court to be decided on merits. Thus, the minister had failed to fully appreciate the scope of his discretion under s. 20(3) of the Industrial Relations Act 1967.

[5] The learned judge had rightly allowed the respondent's application.

[Appeals dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pihak responden, Thong, bekerja dengan syarikat, Berjaya Industrial Bhd. sebagai naib presiden dan pengurus besar, hotel dan resort. Dalam masa tersebut, responden telah digantung kerjanya tanpa kehilangan penggajian, faedah dan faedah istimewa. Beliau dikatakan telah melakukan pelbagai kesalahan tetapi pihak syarikat tidak memberi penjelasan yang spesifik mengenai tuduhan tersebut. Pertanyaaan responden yang seterusnya mengenai perkara tersebut dijawab dengan alasan bahawa lebih masa diperlukan untuk penyiasatan selanjutnya. Responden kemudiannya telah meninggalkan syarikat sambil mengadu bahawa dia telah diberhentikan kerja secara konstruktif.

Perkara tersebut sampai ke perhatian menteri sumber manusia. Menteri tersebut telah enggan merujuk pertikaian tersebut ke Mahkamah Perusahaan, tanpa mengemukakan apa-apa alasan selain dari perkara itu tidak sesuai atau layak. Responden telah memohon ke Mahkamah Tinggi untuk mendapatkan perintah *certiorari* dan *mandamus* untuk membatalkan keputusan menteri itu dan seterusnya untuk mengarahkannya untuk merujuk perkara tersebut ke Mahkamah Perusahaan. Permohonannya diluluskan.

Dari dua kes yang berlainanan, kedua-dua pihak menteri dan pihak syarikat telah membuat rayuan di atas keputusan Mahkamah Tinggi tersebut, sambil mengadu bahawa hakim perbicaraan yang bijaksana telah melakukan kesilapan undang-undang. Dengan adanya tersebut, maka timbullah perbicaraan ini.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Hakim perbicaraan yang bijaksana dengan sebetulnya telah memutuskan bahawa persoalan yang timbul dari pertikaian tersebut seharusnya diputuskan di Mahkamah Perusahaan.

[2] Walaupun tidak dipertikaikan bahawa badan perundangan tidak menginginkan pihak menteri untuk merujuk setiap representasi dari seorang bekerja ke Mahkamah Perusahaan, namun pihak menteri mempunyai budibicara dalam hal ini dan budibicara ini harus diperlakukan dengan sebetulnya.

[3] Samada seseorang pekerja dibuang secara konstruktif adalah suatu pertanyaan undang-undang yang tidak termasuk dalam bidang kuasa pihak menteri untuk memutuskannya dan pihak menteri tidak berupaya untuk membuat keputusan, dan Mahkamah Perusahaan adalah tempat yang sesuai untuk memutuskan perkara ini.

[4] Dalam menjalankan tugas dengan sebetulnya, pihak menteri sepatutnya merujuk perkara tersebut ke Mahkamah Perusahaan untuk dipertimbangkan melaluinya meritnya. Maka, menteri telah gagal untuk menyedari sepenuhnya akan skop bidangkuasanya di bawah kuasa s. 20(3) Akta Perhubungan Perusahaan 1967

[5] Hakim bijaksana dengan sebetulnya telah membenarkan permohonan responden tersebut.

[Rayuan dibatalkan dengan kos.]

Case(s) referred to:
Minister of Labour, Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1), (3)

RS-W-01-195-1996
For the appellant - Asmabi Mohamad SFC
For the respondent - LG Seah; M/s Lobo & Assoc

RS-W02-400-1996
For the appellant - V Sivaparanjothi; M/s V Siva & Partners
For the respondent - LG Seah; M/s Lobo & Assoc

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25-20-1995]

Reported by Adrian Fernandez

JUDGMENT

Shaik Daud Ismail JCA:

These two appeals emanate from the High Court issuing an order of *certiorari* quashing the order of the Minister of Human Resources who refused to refer the respondent's application to the Industrial Court and an order of *mandamus* directing the Minister to exercise his discretion under s. 20(3) of the Industrial Relations Act 1967 (the Act) to refer the matter to the Industrial Court.

The facts of the matter is that respondent was employed by Berjaya Industrial Bhd. (the company) on 16 August 1988 as the manager of its hotel and resort. The respondent served the company for 5½ years and his last post was Vice President and General Manager Hotel and Resorts. This was a re-designated post with effect from 1 January 1994. The duties and functions remained the same as before the re-designation.

On 30 March 1994 the company suspended the respondent but without any loss of emoluments, benefits and other perks, upon a purported allegation of gross and serious misconduct which the company alleged they were investigating. The notice of suspension did not spell out the alleged misconduct but merely stated that it had been alleged that the respondent had committed various acts of misconduct. About 20 days later when nothing transpired the respondent wrote a letter to the company dated 21 April 1994 requesting that he be informed of his position by 28 April 1994. The company replied by a letter dated 25 April 1994 that the investigation was still pending and this time added that the suspension with full pay will continue until the investigation was completed. Then by a letter dated 26 April 1994 the respondent wrote that it was clear that the company did not have any material justifying the sudden suspension and that the prolonged investigation confirmed this. He also gave notice that if the suspension was not lifted and he be reverted to his old job in the company on or before 4 May 1994, he considered himself dismissed by the company with effect from that date. The company replied by letter dated 3 May 1994 denying the respondent's allegation and that the

nature of the allegations were such that it required in depth and prolonged investigation, and that the investigation was still in progress and the suspension should continue.

Since the ultimatum given by the respondent was not met by 4 May 1994, and since there is no provision for a suspension in his contract of service, he considered himself to have been constructively dismissed with effect from 4 May 1994, and he said so in his letter to the company dated 3 May 1994.

Thereafter the respondent made representation to the Director of Industrial Relations *vide* letter dated 10 May 1994, under s. 20(1) of the Act on the ground that he was dismissed without just cause or excuse by the company. Then by a letter dated 21 January 1995, the respondent was informed that the Minister of Human Resources had decided under s. 20(3) of the Act, that his representation was not fit and proper to be referred to the Industrial Court without alluding to any reasons thereof. This prompted the respondent to file the application for an order of *certiorari* and *mandamus* in the High Court.

Dato' V. Sivaparanjothi for Berjaya Industrial Bhd. contended that the learned judge erred in law when he issued the order of *certiorari* and *mandamus* on the ground that the terms and conditions of the employment do not provide for a suspension and therefore the Minister ought to refer the matter to the Industrial Court. It is common ground that there was no suspension clause in the terms and condition of the respondent's employment. In spite of this, it was argued that provisions of suspension is always implied in every contract of employment.

Senior federal counsel Asmabi Mohamad representing the Minister of Human Resources was of similar view.

First and foremost we should make it clear that we are here not hearing this appeal on its merits since the matter was never decided by the Industrial Court. Therefore, whether the suspension was justified or not or whether such a suspension amounted to constructive dismissal or not is not for us to decide in this appeal. What we have to decide is whether the Minister was justified in refusing to refer the matter to the Industrial Court.

With respect, we find that nowhere did the learned judge hold that since the contract of employment did not provide for a suspension, the Minister ought to refer the matter to the Industrial Court. After careful study of the learned judge's judgment, which is in Bahasa Malaysia, we find that what he held was that since the respondent complained that as there was no suspension clause in his contract of service, and since there were no reasons given by the Minister as to why he thought it was not a fit and proper case to be

referred to the Industrial Court, the learned judge was of the view that the respondent's complaint of being constructively dismissed by the appellant was, in the circumstances, a genuine complaint and not frivolous or vexatious. The learned judge also held that the question of constructively being dismissed, being a question of law, the proper forum to decide on this is the Industrial Court after a full hearing. Similarly with the question of whether the appellant has the power to suspend the respondent during the period of investigations of the alleged abuses, since there was no such express clause in the contract of employment. The learned judge came to the conclusion that all these questions are best decided by the Industrial Court. In the light of that, we are in full agreement with the learned judge's findings.

While it is not disputed that the legislature never intended that the Minister refer every representation by an employee to the Industrial Court, but the Minister has been given a discretion to decide and he ought to exercise that discretion properly. In *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 MLJ 9, the Supreme Court had the occasion to consider this discretion. That court held that:

> The Minister had a discretion under section 20(3) of the Act and that is not in dispute. The issue is whether the discretion is unfettered. To say it is an unfettered discretion is a contradiction in terms. Unfettered discretion is another name for arbitrariness.
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> The Minister's discretion under section 20(3) is wide, but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the Court, unless he had misdirected himself in law or had taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refer a complaint which is clearly frivolous or vexatious ...

Whether or not an employee was constructively dismissed is a question of law which is not the province of the Minister to decide and we feel that the Minister is not competent to decide and the Industrial Court is the best venue to decide this question. In the proper exercise of his discretion the Minister ought to have referred the respondent's representation to the Industrial Court to decide on its merits. Therefore, we are equally of the view that the Minister failed to fully appreciate the scope of his discretion under s. 20(3) of the Act, when he declined to refer to the Industrial Court. We are of the view that the learned judge rightly allowed the respondent's application. In the circumstances we dismissed both appeals with costs and ordered the deposits to go to account of taxed costs.